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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 318.

PEORIA AND PEKIN UNION RAILWAY COMPANY, *Plaintiff and Appellant,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, *Defendants and Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT AND APPELLEE, THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

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BRIEF AND ARGUMENT.

I. STATEMENT OF THE CASE.

The history of the controversy which culminated in the issuance by Division 5 of the Commission, of Service Order No. 37, is set forth in appellant's statement of the case with substantial accuracy, but does we believe require some amplification for the purpose of a proper consideration of the grounds upon which the claim of invalidity of the service order is based.

It appears from the allegations of the bill that each of the lines participating in the organization of the Peoria & Pekin Union Railway Company were at the time of its organization operating lines into the city of Peoria and each had, either through ownership or contract rights, terminal facilities therein. Each of them having the desire to extend their facilities within the cities of Peoria and Pekin, they organized the plaintiff company and the plaintiff company acquired, either by deed or lease, all terminal facilities which the organizing lines at that time were operating.

A so-called general contract, Exhibit "2" of plaintiff's bill, was then entered into, in which it was declared that the plaintiff company was organized to the end that the companies effecting its organization might extend their facilities within the cities of Peoria and Pekin, and which granted to the lessees the right to use as tenants in common all facilities of the plaintiff company within said cities. The term of the contract was for fifty (50) years. The capital stock as provided in the contract was to be taken, owned and held by the organizing lines and none of it was transferable by any one without the consent of each of the others, except for the purpose of qualifying directors. It is provided in the contract that each twenty-five (25) per cent of the capital stock was entitled to elect three (3) directors and that the right of cumulative voting should never be abridged without the unanimous consent of all stockholders; that the executive committee should consist of a representative of each interest of twenty-five (25) per cent of the stock; that the general manager could be appointed by the directors only with the acquiescence of the general manager of each of the stockholding lines; that any other employee could be discharged upon the request of any interest, and many

other provisions which related solely to the corporate management and the operation of the property by the plaintiff and not ordinarily present in contracts of lease.

In addition to the foregoing, it was provided that the plaintiff company would provide certain terminal facilities by way of roundhouses, freight houses, turntables, switch engines, and all classes of employees necessary for the operation of its terminal, and that the tenants should have the right to operate over the main lines with their own engines and crews between Pekin and Peoria and should have the right to the use of all tracks necessary to transfer cars to and from connecting railroads, but provided that the actual transfer of such cars must be made by party of the first part (the plaintiff).

Since the organization of the Union Company, the Cleveland, Chicago, Cincinnati & Pittsburgh Railway Company has succeeded to the rights of the Indiana, Bloomington & Western Railway Company, the Toledo, Peoria & Western Railway Company, Samuel M. Russell, receiver, has succeeded to the interest of the Wabash, St. Louis & Pacific Railway Company, the Chicago, Peoria & St. Louis Railway Company, Bluford Wilson and William Cotter, receivers, has succeeded to the rights of the Peoria & Jacksonville Railway Company, and the Illinois Central Railway Company has succeeded to the rights of the Peoria, Decatur & Evansville Railway Company. It also appears that the Lake Erie & Western Railroad Company and the Chicago & North Western Railroad Company have acquired a stock ownership in the plaintiff company and similar rights to use under similar contracts have been acquired; and in addition thereto contracts of tenancy have been entered into with the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company and the Chicago & Alton Railroad Company, W. G. Beard

and W. W. Wheelock, receivers, which are similar to the contracts entered into with the proprietary tenant, excepting only those provisions appropriate to an ownership of stock and management of the company.

None of these tenants, except the North Western, own or operate any terminal facilities within the city of Peoria, and the North Western owns but does not operate yards therein. Its yards are under lease and are operated by the plaintiff company and included within the facilities covered by its contract of tenancy.

Until April 1, 1921, this defendant and its predecessor in interest was also operating in Peoria under a similar contract of tenancy which was not renewed after its expiration on that date. It is alleged in the answer that during the years preceding 1921, the plaintiff failed to discharge its duty under the contract with this defendant in the furnishing of terminal service to such an extent that it was necessary for the purpose of properly discharging its duty in the transportation of freight, that the defendant construct terminals of its own and that after the expenditure of large sums of money on account of such failure on the part of the plaintiff, it had developed in the city of Peoria, yards, roundhouse, coal chute, water supply, and other facilities necessary for the operation of the terminal, and was at that time and has been since doing its own terminal service, operating its own switch engines in its own yards for the purpose of making up and breaking up its freight trains, and is doing for itself, with its own engines and crews, the work which it had formerly employed the plaintiff to do under the provisions of its tenancy contract.

About two (2) months after the expiration of the tenancy contract between the plaintiff and this defendant, plaintiff asserted the right to impose a charge against

this defendant for cars interchanged between this defendant and the plaintiff's tenants. The asserted right was denied by this defendant upon the ground that the delivery of a car to the plaintiff for the purpose of transportation on or beyond the line of a tenant was a delivery to the tenant which had the right to use for that purpose the facilities of the plaintiff, and that the delivery by the plaintiff of a car from the tenant to this defendant was a delivery by the tenant; and in neither case was any service performed for this defendant.

This controversy was brought to a crisis on August 15, 1921, when the plaintiff refused to deliver cars to this defendant which were received from tenants, and refused to accept from this defendant cars tendered by it to the tenants. The congestion resulting from this refusal was relieved by the securing of a temporary restraining order from the Judge of the United States District Court in and for the Southern District of Illinois, and prior to the time of the hearing of this defendant's application for temporary injunction (plaintiff there) a tariff was filed by plaintiff herein under special permission to make the same effective upon one day's notice, which by its terms provided for the assessment of a charge against The Minneapolis & St. Louis Railroad Company for each car moved to or from its connection from or to the East Peoria yard. A motion to dismiss the bill in that proceeding for want of jurisdiction was based upon the existence of this tariff and was sustained. Thereupon this defendant filed with the interstate Commerce Commission its complaint, which was docketed as No. 13110, attacking the validity of the tariff upon the ground that the service for which the charge was sought to be imposed against The Minneapolis & St. Louis Railroad Company was service rendered not for its benefit

but for the benefit of the tenant and was therefore invalid, and also upon the ground that it subjected The Minneapolis & St. Louis Railroad Company to an unlawful discrimination for the reason that no similar charge was sought to be imposed against the Rock Island and the Burlington companies, neither of which were tenants and each of which interchanged cars with the tenants of the plaintiff herein over the facilities of the Union Company.

The opinion of the Commission in that proceeding is attached to plaintiff's bill as Exhibit "3" (Record, page 33), in which the Commission declined to hold that the Peoria & Pekin Union Railway Company had no right to assess any charge against The Minneapolis & St. Louis Railroad Company but did find the tariff unlawfully discriminatory, and an order (Record, page 39) was entered requiring the plaintiff on or before July 13, 1922, to remove the unjust discrimination and undue prejudice found to exist in its report.

Thereafter the Union Company filed its tariff I. C. C. No. 40, which by its terms provided the assessment of a charge against the Rock Island and Burlington companies upon cars interchanged between them, respectively, and the tenant lines. This tariff was suspended pending the hearing, after which the report of the Commission was filed, Exhibit "4" of plaintiff's bill (Record, page 40), holding that the Union Company had failed to justify these charges and they were ordered finally cancelled. In this report the Commission expressly declined to make a finding in 13110, which had been re-opened and consolidated with the hearing on the suspension of tariff I. C. C. No. 40, and entered a formal order dismissing the complaint without prejudice to a re-canvass of the situation, and later entered an order on its own motion for a general investigation.

No change was made in the order of April 13, 1922, to remove the discrimination, but it was decided that it was not open to the plaintiff to remove it by imposing a similar charge against the other lines.

It is the contention of this defendant that the order to remove the discrimination was still in effect and should be complied with, while it is the contention of the plaintiff that the tariff was still in effect and entitled it to collect from this defendant the charges provided for therein.

Upon the threat of the Union Company to interrupt the service, petition was filed by this defendant, calling to the attention of the Commission the threatened interruption, as a result of which, Service Order No. 37 was issued.

Upon the allegations of the bill and exhibits attached thereto, the answers of the United States, the Interstate Commerce Commission and The Minneapolis & St. Louis Railroad Company, and the exhibits attached thereto, respectively, the court declined to issue a temporary injunction as prayed.

II. ARGUMENT.

A. Effect of the Service Order.

The grounds alleged and argued, upon which the claimed invalidity of the order in question is based, as we read the bill, are, first, that the order of the Commission is beyond the authority granted to it for the reason that "plaintiff is required without compensation to handle traffic between The Minneapolis & St. Louis Railroad Company and connecting carriers at Peoria in violation of the terms of said tariff I. C. C. No. 36, which tariff is still in effect and in violation of the constitutional rights

of the plaintiff to demand and receive compensation for facilities furnished and services rendered *to The Minneapolis & St. Louis Railroad Company.*" (Paragraph 14 of the bill, Record, page 11); and, second, that the order "infringes upon the constitutional rights of the plaintiff in that it directs plaintiff to perform an uncompensated service and to continue to perform work *for the Minneapolis & St. Louis Railroad Company,* and to furnish facilities *to that company,* without compensation, which has the effect of depriving plaintiff of its property without due process of law and taking private property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States." (Paragraph 18 of the bill, Record, page 12.)

Under the first of the above allegations the argument is pressed that the order is beyond the powers of the Commission because it requires the plaintiff to do switching for another company, to wit, this defendant; on the second it is urged that its constitutional right to compensation is infringed because the service rendered and facilities furnished in compliance with the order under attack is rendered to this defendant.

Therefore, unless the record upon which the hearing in the court below was had discloses that as a result of the issuance of the service order the switching which is necessary to be done to comply with it is done FOR THIS COMPANY, and the facilities which it is necessary to furnish are furnished TO THIS COMPANY, the order of the court below must be affirmed. On the contrary, if such service as is performed or such facilities as are furnished are not to this defendant but to the tenants which are bound by their contracts to pay therefor, no case of taking property without compensation is presented.

It is our contention that under the record as made

the plaintiff is compensated under its contract with the tenants for all service performed or facilities furnished for the interchange of traffic between the tenants and this defendant. That the order requires the performance of no service for The Minneapolis & St. Louis Railroad Company and that therefore the plaintiff has no right to compensation by The Minneapolis & St. Louis Railroad Company of which it has been deprived. The plaintiff in receiving cars from The Minneapolis & St. Louis Railroad Company for interchange to its tenants, and in delivering cars from the tenants to The Minneapolis & St. Louis Railroad Company, is acting merely as the agent of the tenants, and is discharging its duty to them under its contract to furnish facilities for the receipt and delivery of cars from and to connecting railroads. An analysis of the contract under which the plaintiff furnishes terminal facilities and services to its tenants shows that the facilities used in interchange are used by the tenant and the services rendered are rendered for the tenant. Therefore the order requires of the plaintiff no more than is required by the tenancy contracts, for the compensation by them provided.

The preamble of the contract, after designating the parties, plaintiff as the first party and the four organizing lines as the second, third, fourth and fifth parties, respectively, recites:

> "That whereas the four last named railway companies for the more convenient and economical transaction of their business and the better accommodation of the public desire to extend and improve their facilities in the city of Peoria in the state of Illinois and to that end have caused to be organized and incorporated under the laws of the state of Illinois the said Peoria & Pekin Union Railway Company, party of the first part hereto, the capital stock

of which is to be taken, held and owned by the said four constituent companies, as hereinafter mentioned."

The declared purpose of the contract, then, was to extend and improve the facilities within Peoria then owned by the organizing lines. And then follows a description of the facilities which the plaintiff acquired for the purposes of its organization and uses, and then a general grant of the right to use, in the following language:

> "That the said party of the first part hath let, leased and demised and by these presents doth let, lease and demise unto said parties of the second, third, fourth and fifth parts, respectively, their successors and assigns, all and singular its main tracks, sidetracks, switches, turnouts, connecting tracks, roundhouses, freight houses, passenger depots and all its terminal facilities in said cities of Peoria and Pekin, whether the said described premises are now owned or held by said first party or shall be hereafter acquired."

It is then provided that the premises could be used in a certain manner. First, the right to use in common the main track for running in trains with their own engine and employees between Pekin and Peoria.

Following this the use of certain facilities not here material is provided, and then:

> Fourth, (Record, page 19). "The said lessees shall severally have the right to the use of all the transfer tracks, sidetracks, switches and turnouts and other terminal facilities of the first party at the said cities of Peoria and Pekin for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses, warehouses, packing houses, stockyards, grain elevators, distilleries, mills and other industries, *and to and from the*

tracks and warehouses of other railroads, with any of which the tracks of the first party shall at any time be connected, whether such tracks or any of them shall be owned or held or in some otherwise controlled by said first party; and the said first party for the considerations aforesaid, doth hereby covenant and agree promptly and efficiently and without discrimination or partiality in favor of any company or the business thereof, to make such transfers of the loaded and empty freight and other cars of said lessees, respectively, etc."

It is also provided in the contract (Record, page 23):

"The said lessees shall also severally pay at the time and in the manner aforesaid, or within ten (10) days after a statement thereof shall be furnished by the party of the first part, all such reasonable charges as shall be made by the party of the first part for the preceding calendar month for the transfer service herein *required* to be done *to and from connecting railroads,* being a uniform rate per car which shall have been previously fixed by said party of the first part, to be charged to all companies for such services, without discrimination, and which shall approximate the actual cost of such service as nearly as practicable, which shall include the charges for making up trains."

It is further provided (Record, page 24):

"And that all of the loaded and empty freight cars of said lessees respectively, coming into and going out of the said city of Peoria, whether the same be for transfer to or from the said main tracks and to or from other railroads or consigned to or from any of the industries in the city of Peoria aforementioned, *shall be delivered to said party of the first part* to be transferred, switched or handled *by it for such lessee* and that all of the freight or passenger trains of such lessees, respectively, moving to or from Peoria shall pass over the track of said first party."

Upon the foregoing provisions this defendant bases its contention that the facilities used and services rendered in transferring a car from a nontenant connection to a tenant or vice versa, are rendered for or furnished to the tenant and not the nontenant, and that such a transfer constitutes a use by the tenant in the manner provided, which excludes the possibility of the same facilities being at the same time used by the nontenant from or to which the car may be transferred.

All the facilities of the plaintiff company are leased to the tenants. The main line may be used for the purpose of running a train between Pekin and Peoria with the engines and crews of the tenant. The side tracks, turnouts and switches may be used for the purpose of a transfer of a car from tenant to a line connecting with the plaintiff's rails, or in the reverse direction with the engines and crews of the plaintiff. The right to the use of the main line for the purpose of running a train and to the use of such facilities as are necessary to effect a transfer of a car to a connecting line, differ only in the respect that in the case of the main line the engines and crews of the tenant may be used, while in the case of the transfer of a car to a connection the engines and crews of the plaintiff must be used. In either case it is a use by the tenant. The requirement that the transfer must be made by the first party is a mere qualification upon the manner in which the right may be enjoyed, but is none the less a use by the tenant and not that of the connection to or from which the car may be transferred.

Each time the engine of the Union Company makes a transfer of a tenant's car from or to a connecting railroad, it constitutes a use by the tenant of the facilities of the plaintiff which are necessary to make such transfer. This being true, the plaintiff is not required by

Service Order No. 37 to allow *this defendant* to use its facilities without compensation or to perform switching service *for this defendant.* It has required that all cars coming into and going out of Peoria "whether the same be for transfer to or from said main track, or to or from other railroads," be delivered to it and it has agreed that they will be transferred by it "for such lessee." In other words, it has provided by its contract that it will accept on behalf of its tenants all cars arriving over the lines of other railroads, which are to move out of Peoria over the line of any tenant. The tenants have obligated themselves to receive cars in no other way than through the facilities of the Union Company, and when received either from the tenant for transfer to other railroads or from other railroads for transfer to tenants, the Union Company has ageed that it will make the transfer for said lessee. By the terms of the contract then, the transfer of a car to or from a connecting railroad is defined to be a use by the tenant. It has granted the right to use the transfer tracks for such purpose to the tenants. That use may be enjoyed by the employment of the Union Company's engines and crews but it is none the less a tenant's use, for which the tenant agrees to pay.

The facilities of the Union Company are the only facilities upon which the tenants may receive or through which they may deliver cars from or to lines connecting with the Union Company. They cannot interchange cars between themselves except through the agency of the facilities and services of the Union Company. Cars for tenants are delivered to the Union Company because it is their receiving agency.

Therefore, when The Minneapolis & St. Louis Railroad Company delivers a car to the Union Company which in the course of transportation is to move out of Peoria

over the line of a tenant, the delivery to the tenant is complete and the movement from there on, whether made by the Union Company or the tenant is made only for the purpose of discharging the duty which the tenant owes to carry on the transportation; and if it sees fit to employ the engines and crews of the Union Company for the purpose of switching a car into a train instead of employing its own, or sees fit to acquire operating rights over the facilities of the Union Company instead of acquiring tracks and yards of its own, the obligation to compensate the Union Company is that of the tenant and not that of the connection from which the car was received.

It has been contended before the Commission that this clause of the contract granting to the tenant the right to have transfer service performed gave to the tenant only the right to make a demand for the performance of said service, and involved no obligation on its part to require the Union Company to perform it. It required, however, no contract between the tenant and the Union Company to impose upon the Union Company the duty to make a transfer of a car upon demand. That is one of its common carrier duties. If the Union Company were unquestionably an independent intermediate carrier it would be under obligation upon the tender of a car to it for transfer, to make the transfer. But under its common law duty as a carrier the Union Company would not be bound to receive trains and break them up and furnish freight houses and team tracks nor would it as a carrier have any right to compel a carrier to make delivery of cars to it for transfer by it to or from a connecting line. The contract was intended to extend the facilities of each of the tenants so that each might receive cars at any point where the facilities of

the Union Company made it possible to do so, and after being received upon such facilities, have the same transferrred and placed in train for movement beyond Peoria.

For any car transferred from a tenant to any railroad whose tracks the Union Company connects the tenant pays the plaintiff, and for any car received from the Union Company's connection and delivered to a tenant, the tenant likewise pays. It pays because the contract has defined such a transfer to be a use by the tenant. That is the use for which it agreed to pay. This obligation of the tenant commences and ends with the use. The commencement or termination of the use by the tenant is the termination or commencement of the duty of the nontenant.

In *Chicago & Alton Railroad Co. vs. Peoria & Pekin Union Railway Co.*, 250 Ill. 320, 95 N. E. 137, the contract was given the construction for which we here contend. The contention that the Union Company was the agent of its tenant was made by the Union Company itself. The case involved the right of the Alton to recover from the Union Company an amount of money that it had been required to pay on account of pilferage of goods from a car which had been transferred by the Union Company from an Alton train to a team track for unloading. After it had been set at the unloading point by the Union Company and the liability had become that of a warehouseman, the car was broken into and robbed and the Alton held liable to the consignee for the loss. After payment, the Alton undertook to recover over from the Union Company. The Union Company contended that it was not liable to the Alton for the reason that in moving the car from the Alton's train to the team track it was acting merely as the agent of the Alton and that after it had placed the car upon the track its duty with

respect thereto terminated while that of the Alton continued. The case was decided by the court in accord with this contention. The court used the following language:

> "In the contract between the parties, the appellee is referred to as a lessee. In fact it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete though not so extensive as that of appellant who owns them. This right is not exclusive but is shared by the appellant and the other railroad companies to whom similar leases have been made. Whenever any part of appellant's track is occupied by the appellee's cars placed there under the contract for delivery to the consignee, the occupancy is the appellee's occupancy. It is for the time being exclusive and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee wants a car placed on one of appellant's tracks which the appellee has the right to use, and the car is accordingly so placed, *the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of the appellee's own track except that appellee cannot use its own motive power to change the location of the car but must call upon the appellant for that purpose.*" (Italics ours.)

This is precisely the claim made by this defendant and is the ground upon which it based its refusal to pay to the Union Company any sum on account of cars delivered to it for transportation by its tenants or received from it in interchange from the tenants. When cars designed for transportation over the line of a tenant are placed by this defendant upon the Union Company's tracks, it is delivery to the tenant and the occupation of the track by the car is the occupancy of the tenant. The cars being placed upon the Union Company's tracks for

transfer, upon a track which the tenants have a right to use, the language above quoted, "that the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of appellee's own track" is applicable to the situation. It is, then, the duty of the tenant to move the car to any place which it may find convenient but having agreed not to use the tracks for the purpose of transfer of cars except by the use of the motive power of the Union Company, is compelled to employ that company to do such work and necessarily incurs the obligation to compensate the Union Company for doing it.

It is further said in the opinion:

> "In switching and transferring cars in accordance with appellee's direction, whether from the appellee's terminal in Peoria to the track of appellant convenient for delivery to the consignee, or from one of the tracks or divisions of appellee's railroad to another of such tracks or divisions *or to another railroad or from one of the appellant's tracks to another, the appellant's duty and liability are the same. In all of this switching service of whatever character it acts merely as the agent of the appellee* to shift the latter's cars from one track which the appellee has a right to use to another track which it has a right to use for the purpose of enabling the appellee conveniently to complete its contract of carriage and make delivery to the consignee." (Italics ours.)

It seems therefore that in performance of such service as is necessary in effecting interchange of cars between The Minneapolis & St. Louis Railroad Company and the tenants of the plaintiff over the tracks which the tenants have the right to use, the plaintiff acts merely as the agent of the tenant.

Therefore, whenever a car touches a track of the Union Company it is upon a track which the tenant has the right to use. Its movement from that point to any other point within the terminal if made by the plaintiff is made by it as the agent of the tenant, in order to enable the tenant to discharge its duty of carriage, and being made for such purpose, it is manifestly improper to assess a charge therefor against the connection who places the car upon the Union Company's facilities for the purpose of delivering it to the tenant.

The following language is also pertinent:

> "Since it (the Alton) had no facilities for delivering freight at its own terminal, it obtained from the appellant a lease on other premises and since it could reach such premises only over the appellant's track, it employed the appellant to switch its cars to such premises."

The same reasoning is applicable to the transfer of cars from one railroad to another. Since the tenants have no facilities of their own in Peoria for the receipt or delivery of cars from or to connecting railroads, it has employed the Union Company to switch cars for that purpose over premises which it obtained from the plaintiff by a lease.

It is proper to consider in connection with these tenancy contracts the definition of the term "railroad" as set forth in Paragraph 3 of Section 1 of the Act to Regulate Commerce. It provides:

> "The term railroad as used in this act shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated un-

der a contract, agreement or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such freight."

Here it is seen that the terminal facilities of the Union Company are used by the tenants and necessary for the purpose of receipt or delivery of freight, and are in fact operated under contract of lease by virtue of the provisions of the contracts which grant to the tenants the right to use the facilities for the purpose of interchange of cars. By reason of the necessity that such facilities be used to enable the tenants to complete the discharge of their common carrier duties, the facilities of the Union Company are plainly a part of the "railroad" of each of the tenants operating into Peoria. There is, therefore, a direct connection between the rails of this plaintiff and the facilities of each of the tenants. In such case it is the duty of each line to operate up to the point of connection. That is the place where the duty of each begins and ends.

The situation is not dissimilar to that presented by the record in the case *C. M. & St. P. Ry., et al. vs. Minneapolis Civic Association*, 247 U. S., 490. In that case certain terminal facilities were owned by the Minneapolis Eastern Company, the stock of which was owned in equal parts by the Milwaukee and Omaha companies. There were also contracts between the Eastern Company and each of its stock holding lines, granting to them the right to use the facilities in a way similar to the provisions of the contract in the case at bar. The contracts likewise contained provisions relating to the control of the company and this court affirmed the decree of the Supreme

Court of Minnesota in holding that the facilities of the Eastern Company were in fact merely the facilities of the stock holding lines. In the opinion this language is used:

> "While the statements of the law thus relied upon are satisfactory in the connection in which they are used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to not for the purpose of participating in the affairs of a corporation in the normal and usual manner but for the purpose as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *U. S. vs. Leigh Valley R. R. Co.*, 220 U. S., 257, 273. *U. S. vs. Delaware, Lackawanna & Western*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but regardless of fictions will deal with the substance of the transactions involved as if the corporate agency did not exist and as the justice of the case may require."
>
> "Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning company. The order of the Commission affirmed by the Supreme Court of Minnesota, so far from being arbitrary is plainly just and clearly it does not deprive the plaintiffs in error of their property without compensation or without due process of law by requiring as it does that for rate making purposes the Milwaukee and the Omaha companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks for similar services rendered."

We have in the statement of the case called attention to many provisions in the contract relating to corporate control which are similar to the provisions existing in the contracts between the Omaha, Milwaukee and Eastern companies, which when considered in connection with the fact that the Union Company was organized for the purpose of consolidating the terminal facilities which at the time of its organization were owned by the organizing lines, the broad grants contained in the leases themselves, the fact that they were renewable upon like terms forever, the principle in the Eastern case becomes controlling here. To paraphrase a part of the preceding quotation, the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Union Company should not be permitted to become the warrant for permitting a charge upon connecting carriers greater than they would be required to pay if that title were in the owning companies.

It is obvious that if the title to the tracks of the Union Company which connect with the tracks of this company were in the tenants instead of the Union Company no charge could be assessed against this defendant for the delivery of cars upon those tracks in interchange with the tenants.

It is also pertinent to consider the following language from that opinion in connection with the declared purpose of the contract, the situation that existed prior to the organization of the Union Company and the character of the contracts executed:

> "This discussion of the evidence in this case renders it very clear that the purpose of the Milwaukee and Omaha companies from the beginning was to construct and operate but one track to the group of industries to be served instead of each building and

maintaining its own track and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Eastern Company and in order that their purpose might not be defeated in the future by the design or business necessity of either company, the contract between them which we have discussed was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose."

So in the case at bar it is very clear that the purpose of the organizing companies was to construct and operate but one set of facilities instead of each building and maintaining its own, and to use those facilities in common so that each might have the benefit of them as fully as if each were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Union Company, and in order that their purpose might not be defeated in the future the contract between them was entered into to prevent the corporate organization of the Union Company and the control of its operation from being changed by any of them without the consent of each of the others.

B. The Claim That the Order Violates the Tariff.

It is the claim of the appellant that the order requires it to switch cars for this defendant in violation of the terms of its tariff.

The tariff provides for the assessment of a charge per car between the track connection of The Minneapolis & St. Louis Railroad Company and the Peoria & Pekin

Union Railway tracks in East Peoria yard, and carries the notation "Will not apply to switching service for tenant companies under tenancy contracts."

It therefore means that if a car is moved between the Union Company's tracks in East Peoria yard and the track connection of The Minneapolis & St. Louis Railroad Company for a tenant company under a tenancy contract, the charges provided for do not apply. The movement of a car between the two points mentioned is, as we have attempted to demonstrate, a switching service for a tenant company under a tenancy contract and therefore within the exception provided for in the note.

Moreover, if the record discloses a situation which makes it unlawful for the Union Company to impose a charge against this defendant, the tariff is itself unlawful and need not be observed. See *Boston & Maine vs. Piper*, 246 U. S. 439.

III. CONCLUSION.

We therefore respectfully submit that under the allegations of the bill and answers of the respective parties, when considered in connection with the exhibits attached thereto, the service order, the contract, the reports of the Commission attached to the bill, it is clear that the order requires nothing more of the plaintiff than that it continue to act as agent of each of its tenants in delivering to and receiving from connections, cars interchanged with the tenants; that in permitting such interchange to be made its facilities are not used by this defendant nor is any service performed for it, but on the contrary such use of facilities is enjoyed by and such services as are necessary are rendered to the tenants for which under the terms of the contract compensation to the Union Company is provided.

Therefore, it is unnecessary to determine whether or not the order requires switching or the performance of services for another carrier or whether or not it is within the power of the Commission to order such services to be performed. Whether, as an abstract proposition, the order under its terms goes beyond the powers conferred by Congress is immaterial, for the reason that under the situation as presented by the record in this case the plaintiff has failed to show that as a result of the issuance of the said order its property is being taken for public use without compensation or that it is deprived of its property without due process of law. The claims of constitutional infringement of plaintiff's right are based entirely upon the assumption that the services required to be performed and the facilities furnished are performed *for* and *furnished to The Minneapolis & St. Louis Railroad Company.* That this is an erroneous assumption is clear. The facilities are furnished to the tenants under the terms of the tenancy contracts. The services performed thereon or therewith are performed for the tenants under the same agreements. By virtue of those contracts the facilities have become part of the railroads of the tenants and neither they nor their agent has any right to collect from a connection a charge for receiving or delivering a car in interchange. The plaintiff has no right to be compensated by this defendant and this being the only right of which it claims it is deprived by the issuance of the service order, it follows that the order of the District Court must be affirmed.

Respectfully submitted,

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